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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1967

No. 15

STELLA HUGHES, *Petitioner*

v.

STATE OF WASHINGTON, *Respondent*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF WASHINGTON

BRIEF FOR THE RESPONDENT

JOHN J. O'CONNELL,
Attorney General,

HAROLD T. HARTINGER,
J. R. PRITCHARD,
JOHN R. MILLER,
Assistant Attorneys General,

Attorneys for Respondent.

Temple of Justice, Olympia, Washington 98501
Telephone 753-5318, Area Code 206

STATE PRINTING PLANT, OLYMPIA, WASH.

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OPINIONS BELOW

The opinion of the Superior Court of the State of Washington for Pacific County (R. 16-21) is unreported. The opinion of the Supreme Court of the State of Washington (R. 22-42), and dissenting opinion (R. 42-48), are reported at 67 Wn.2d 799, 410 P.2d 20.

JURISDICTION

The opinion of the Washington Supreme Court was filed on January 20, 1966. It became the final

judgment of the court on April 14, 1966, upon denial of a petition for rehearing (R. 63-64) and issuance of the remittitur (R. 64-65) to the trial court. The petition for writ of certiorari was filed on July 12, 1966, and was granted on January 9, 1967 (R. 65), 385 U.S. 1000. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

As interpreted by the Washington Supreme Court, article 17, section 1, of the Washington Constitution establishes the line of vegetation,[1] as it existed on the date of statehood, as a fixed boundary marking state tideland ownership. The questions presented here are:

1. Whether the state may prospectively abolish an upland owner's common law riparian right to acquire tideland by accretion where title to the upland property is deraigned from a United States patent issued prior to statehood?

2. Whether the state may designate the *line of*

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[1] As used here and throughout the remainder of this brief, "line of vegetation" means an observable line impressed upon the soil by action of the water which covers it for sufficient period to deprive the soil of vegetation and destroys its value for agricultural purposes. It is the equivalent to the line utilized by the United States to mark the limits of its navigational servitude over non-tidal waters, *e.g., Borough of Ford City v. United States,* 345 F.2d 645 (3d Cir. 1965), and by the State of Washington to mark the limits of its ownership under navigable lakes, *Austin v. Bellingham,* 69 Wash. 677, 680-81, 126 Pac. 59, 61 (1912), and streams, *Washougal Transp. Co. v. Dalles Nav. Co.,* 27 Wash. 490, 497, 68 Pac. 74, 77 (1902).

vegetation as the boundary of tidelands (rather than the *line of mean high tide*[2]) where title to adjoining upland is deraigned from a United States patent issued prior to statehood?

STATEMENT

I

Stella Hughes owns upland proprety on the Long Beach Peninsula near Ocean Park, Washington (R. 23). Her property is a part of Government Lot 3 in Section 4, Township 11 North, Range 11 West, W.M., which at the time of the original government survey in 1859 was bounded on the west by the Pacific Ocean (R. 23). Private title to Lot 3 antedates Washington statehood and was initiated by a patent from the United States (R. 23).[3]

Since the original government survey in 1859, accretions to the beach and shore of the Pacific Ocean have added extensive areas of fast land to the westerly side of the Long Beach Peninsula (R. 8).

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[2]As used here and throughout the remainder of this brief, "line of mean high tide" means a line where the shore is intersected by the tidal datum plane elevation of "mean high tide" as defined by the U. S. Coast and Geodetic Survey in *Special Publication No. 135, Tidal Datum Planes* 86 (rev. ed. 1951). It is the line approved by this Court in *Borax, Ltd. v. Los Angeles,* 296 U.S. 10 (1935), to mark the limit of tidelands adjacent to Morman Island in Los Angeles harbor.

[3]The patent is not included in the record of this case. However, it is a matter of public record, see *Brief for the United States as Amicus Curiae* 2, and is set out in full as Appendix A to the state's *Reply to Memorandum for the United States as Amicus Curiae* 12-13. Since issuance of the patent on July 2, 1866, the United States, of course, has had no interest in the lands.

The record shows that in front of Mrs. Hughes' property the distance from the government meander line of Lot 3 to the 1963 line of vegetation[4] was over 525 feet; the distance from the meander line to the 1963 line of mean high tide[5] was over 910 feet (R. 26; R. 15, Def. Ex. 5, Map No. 1). Such growth of accreted lands along the Washington coast is not uncommon. Most of the shore and beach of Grays Harbor and Pacific Counties has grown in this fashion. (R. 15, Def. Ex. 5, Maps Nos. 2-4.)

In the past the State of Washington has claimed ownership of that portion of the accreted land formed from state-owned tidelands and its claim has developed into a local rule of property (R. 36).[6] Over the years 73 lawsuits affecting 322 private ownerships have been instituted against the state to divide private from public land. In every one of these cases the superior court divided the accretions on the same formula: those accretions formed prior to statehood belong to the private upland owner; those accretions formed after statehood to the public beach and shore. (R. 36; R. 15, Def. Ex. 5, pp. 2-3, Map Nos. 2, 4.)[7] Furthermore, in Grays Harbor County, where statute[8] so directed, the state delivered over a hundred

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[4]See note 1, *supra*, p. 2.

[5]See note 2, *supra*, p. 3.

[6]See, also, *United States v. Washington*, 294 F.2d 830, 831-32 (9th Cir. 1961).

[7]For the purpose of division of the 1889 (statehood) line of vegetation, not the 1889 line of mean high tide, served to mark the boundary between the private and public property (R. 26, 36; R. 15, Def. Ex. 1, p. 2).

[8]Wash. Laws of 1929, ch. 78 (uncodified).

deeds conveying accreted lands along the coast to private grantees (R. 15, Def. Ex. 5, pp. 2-3, Maps Nos. 3, 4).[9] Consequently, the greater portion of the accreted land between the Copalis River and Grays Harbor has been sold (R. 15, Def. Ex. 5, Map No. 4); approximately sixty sales have been made in the Grayland area south of Grays Harbor (R. 15, Def. Ex. 5, Map No. 5).

II

Public ownership of the beach, shore, and accreted land along the coast of Washington, west of the 1889 line of vegetation, has long been reserved for public recreational use. In 1901 the Washington legislature dedicated the "shore and beach" from the Columbia River north to the Queets River as a "public highway forever."[10] Wash. Laws of 1901, chs. 105, 110; Wash. Rev. Code §§ 79.16.160-79.16-.171. This dedication, of course, included the shore and beach along the westerly side of the Long Beach Peninsula where the property of Mrs. Hughes is

[9]See, also, *United States v. Gas & Oil Development Co.*, 126 F. Supp. 840, 845 (W.D. Wash. 1954).

[10]As interpreted by the Washington Supreme Court, these acts of the legislature did not create a road intended for automobile traffic; they created a recreational area (R. 32). As Judge Fullerton explained in *Williams Fishing Co. v. Savidge*, 152 Wash. 165, 181, 277 Pac. 459, 464 (1929):

> Prior to the year 1901, when the legislature declared the tide lands to be a public highway, the beach had become a favored resort for the people of the state who were seeking rest and recreation, and, as I gather from the surroundings and the current history of the times, the purpose of the legislature was, not so much to establish a thoroughfare, as it was to preserve the beach as a recreational ground for the use of the public.

located. The remainder of the beach, from the Queets River north to Cape Flattery, was similarly dedicated to public use in 1935. Wash Laws of 1935, ch. 54; Wash. Rev. Code §§ 79.16.130-79.16.150.

The inner or inland boundary of the "public highway" could be construed, under a literal reading of the dedicatory acts, as a moving boundary so as to free the beach and shore of the statutory dedication as fast land was added by accretion (R. 32-33). However, prior to the Washington court's opinion in the present case, the dedicatory acts were not generally read in this fashion.[11] In 1928 the Washington Attorney General ruled that fast land built by accretion remained subject to the dedication. He said:

> With the gradual accretion of the ocean sands the strip uncovered by the ebb and flow of the tide gradually receded to its present position creating from time to time new area constituting a public highway by reason of the language "as such shore and beach * * * *hereafter may be*", but this gradual recession did not, in our opinion, have the effect of divesting the former area of its character as part of the public highway. 1927-28 Opns. Att'y Gen. 779, 780 (Wash. 1928)

A year later, in 1929, the Washington legislature apparently accepted the Attorney General's views about a fixed inner boundary to the public highway and proposed a change to a moving boundary, at least in Grays Harbor County. By Wash.

[11]The court below left the question open (R. 32), 67 Wn.2d at 807, 410 P.2d at 25; the dissenting judges would give the dedicatory language a literal reading (R. 46-47), 67 Wn.2d at 819-20, 410 P.2d at 31-32.

Laws of 1929, ch. 78 § 1, the legislature authorized the sale of,

> All lands owned by the state bordering on the Pacific Ocean * * * [within Grays Harbor County] lying above on the land side of the inner boundary of the highway reservations made by chapter CV and chapter CX, Laws of 1901, same being a line of ordinary high tide as the same is now located or as it may hereafter exist.

All inference that the statute was intended to operate outside of Grays Harbor County and in Pacific County as well (where Long Beach Peninsula and Mrs. Hughes' property is located) was soon dissipated as an indirect result of the *Williams Fishing Co.* opinions of the Washington Supreme Court.[12]

The issue in *Williams Fishing Co.* was whether Peacock Spit (located at the mouth of the Columbia River in Pacific County) was subject to the public highway dedication. When the case was heard *en banc*, after a departmental hearing and opinion, four of the nine members of the court chose to comment about the inner boundary of the highway. The views of three of the judges were most explicit. Judge Fullerton (with Judges Parker and French concurring) said, 155 Wash. at 453-54, 284 Pac. at 748:

> As I understand it, the grant [of the highway to the public] was a grant of a specific tract of property, as much so as it would have been had it been described by metes and bounds. In effect,

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[12] *Williams Fishing Co. v. Savidge*, 152 Wash. 165, 277 Pac. 459 (1929) (departmental opinion); *on rehearing*, 155 Wash. 443, 284 Pac. 744 (1930) (en banc); *after trial*, 164 Wash. 50, 2 P.2d 722 (1931).

> the grant was of the tide lands to which the state had title; such tide lands as it acquired by the reservation made in the constitution at the time the territory of Washington was admitted into the Union as a state. The lands acquired by that reservation are in no sense ambulatory. They are fixed and determined. Under the somewhat peculiar wording of the dedicatory grant, the highway may widen by accretions thereto, but the inner shore lines and the end lines remain the same. If any part of the tide lands have become uplands by accretion since the reservation was made, the highway extends over such uplands, * * *

Nonetheless, only Judge Holcomb of the remaining members of the court saw fit to reject the fixed inner boundary in favor of an ambulatory line, and even he remained silent about state ownership of accreted land above such an ambulatory line. *Id.* at 448-50, 284 Pac. at 746.

III

Two recent enactments of the Washington legislature manifest a clear intent to preserve the Washington shore and beach for public recreation. The first of these enactments became law before this present case was decided, Wash. Laws of 1963, ch. 212; RCW 79.16.172. The statute specifically declares:

> That *portion* of the public highway as established by chapter 54, Laws of 1935, chapter 105, Laws of 1901, and chapter 110, Laws of 1901, lying between the line of vegetation and the line of mean high tide, as such lines now are or may hereafter be, is hereby declared a public recreation area and is hereby set aside and forever

reserved for the use of the public. [Emphasis ours.] Wash. Rev. Code § 79.16.172.

The statute does not purport to redefine either the inner or outer boundaries of the earlier public highway dedication. Instead, it expresses a legislative judgment[13] that the prior legislative acts did include that portion of the beach and shore between the line of mean high tide and the line of vegetation. (In front of Mrs. Hughes' property this strip of beach is 386 feet wide (R. 26).)

The second of the two enactments was adopted by the Washington legislature after the decision in the present case, Wash. Laws of 1967, ch. 120 (set out as Appendix A, *infra*, pp. 35-42).

The 1967 legislation affects the entire length of Washington's Pacific Ocean beaches by establishing the Washington State Seashore Conservation area "for the recreational use and enjoyment of the public", § 2, *infra*, p. 36. All lands now or hereafter under state ownership "between the present line of ordinary high tide and the line of extreme low tide, as this line now is or may hereafter be located" are included within the Seashore Conservation Area, *ibid.*, and these lands are to be devoted to all forms of outdoor recreation, subject to the general jurisdiction of the Washington State Parks and Recreation Commission, §§ 1, 4, 5, *infra*, pp. 35-36, 36-37.

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[13] The Washington House of Representatives passed the measure without a dissenting vote. *Journal of the House, 38th Legislature* 1185 (1963). The measure passed with but one dissenting vote in the Washington Senate. *Journal of the Senate, 38th Legislature* 905 (1963).

Accreted lands between the Seashore Conservation Area and private ownership are placed under the jurisdiction of the Department of Natural Resources, but subject to a prohibition against sale, lease, or other disposal, with only minor exceptions,[14] § 8, *infra*, pp. 39-40. The purpose of the restrictions is to permit the Parks and Recreation Commission to select portions of the accreted lands for use in connection with the Seashore Conservation Area.

Under section 11 of the act, *infra*, pp. 40-41, the boundary between state-owned accreted land and adjacent property is to be monumented by the Department of Natural Resources. Objections to the location of monuments are to be heard by the State Harbor Line Commission, § 12, *infra*, p. 41.[15]

IV

Mrs. Hughes initiated this litigation as a suit to quiet her upland title seaward to the line of mean high tide as it may exist any given time (R. 2-3, 23). Her claim of title thus encompassed all accreted land formed in front of her property (both before and

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[14]The statute permits exploration for oil and gas, but prohibits drilling rigs and equipment on the Seashore Conservation Area or on the accreted lands, and with the approval of the Parks and Recreation Commission, it permits limited sales of sands to local cranberry growers and mining of "black sands," a mineral, between the north jetty of the Columbia River and the North Head Lighthouse. No other private use of the accreted lands is permitted.

[15]The filing of objections with the Harbor Line Commission is not made mandatory by § 11(2), and it would appear that the private owner may therefore bypass administrative remedies and instead challenge the location of monuments by direct action in superior court.

after statehood) and the upper 386 feet of the beach lying between the line of mean high tide and the line of vegetation (R. 26).

The state disclaimed title to accreted land formed prior to statehood, but asserted title (subject to the 1901 highway dedication) to accreted land formed after statehood. Additionally, the state contended that the boundary between its ownership and Mrs. Hughes' ownership was the line of vegetation as of the date of statehood (November 11, 1889). (R. 3-5, 23-24.)

After trial the superior court sustained Mrs. Hughes' claim of title (R. 7-10) and the state appealed. On appeal the Washington Supreme Court reversed, holding that article 17, section 1, of the Washington Constitution operated on the date of statehood to extinguish all riparian rights of uplands adjacent to state-owned tidelands, including the right to acquire that tideland in the future by accretion, thus fixing the state's tideland boundaries as of that date (R. 37-40). In so ruling the court rejected the line of mean high tide of the U.S. Coast and Geodetic Survey as the upper limit of the tidelands claimed by the state under article 17, section 1 (R. 35), and instead approved the past marking of the upper limits by the State Commissioner of Public Lands (R. 36-37) on the basis of the line of vegetation (R. 15; Def. Ex. 1, p. 2).[16]

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[16]The state's understanding of the court's opinion on this issue is shared by Mrs. Hughes and Professor Corker, who has written an exhaustive comment about this case.

SUMMARY OF ARGUMENT

Question No. 1. A state may prospectively abolish an upland owner's common law riparian right to acquire tideland by accretion even though title to the upland property is derived from a pre-statehood patent issued by the United States (*infra*, pp. 14-22).

The state may make the change because no riparian owner has a vested right to future accretion, *Western Pac. Ry. v. Southern Pac. Co.*, 151 Fed. 376 (9th Cir. 1907) (*infra*, pp. 15-17), even though his title is derived from the United States, because it has long been settled federal law that Washington could abolish all riparian rights on navigable waters, *Port of Seattle v. Oregon & Wash. R.R.*, 255 U.S. 56 (1921), and because riparian rights under a United States patent are left entirely to the state, *St. Anthony Falls Power Co. v. Water Comm'rs*, 168 U.S. 349 (1897) (*infra*, pp. 17-21).

Borax, Ltd. v. Los Angeles, 296 U.S. 10 (1935), is not authority for a federally created right to future accretion because (1) the case is not an accretion case nor concerned with riparian rights generally, and in any event (2) the right to future accretion (in the absence of all other riparian rights) does not qualify as an "essential" basis of right within the federal rule for rejecting state law (*infra*, pp. 21-22).

Question No. 2. Washington may designate the

See *Brief for the Petitioner* 4, 10, 15-18, and Corker, *Where Does the Beach Begin, and to What Extent is this a Federal Question*, 42 Wash. L. Rev. 33, 43-45 (1966).

line of vegetation as the boundary of its tidelands (even though title to adjoining upland is derived from a pre-statehood United states patent) because such a line is a reasonable interpretation of the common law and one which does not impair the efficacy of the federal grant or the use and enjoyment of the upland property (*infra*, pp. 22-34).

Washington's choice of the vegetation line as its tideland boundary was made in the early days of statehood and in accordance with the applicable federal rule of that time as announced by this Court in *San Francisco v. LeRoy*, 138 U.S. 656 (1891) (*infra*, pp. 23-25). The line of mean high tide rule, as applied to the facts of this case, would vest an upland owner with a strip of ocean beach 368 feet wide, thereby partitioning upland from tideland in a manner that totally ignores the characteristics of tidelands which constitute the very reason for assignment of their ownership to the state as soverign (*infra*, pp. 25-28).

Borax, Ltd. v. Los Angeles, 296 U.S. 10 (1935), properly understood, does not preclude designation of the line of vegetation by state law as the water boundary of federally patented uplands. Therefore the usual rules governing the construction of federal patents should be applied, *i.e.*, federal law should be deemed to incorporate state law. *Packer v. Bird*, 137 U.S. 661 (1891); *Oklahoma v. Texas*, 258 U.S. 574 (1922). If *Borax* is now construed to be applicable to this case, we ask the Court to overrule the prior holding (*infra*, pp. 28-34).

ARGUMENT

A.—*A state may prospectively abolish an upland owner's common law riparian right to acquire tideland by accretion even though title to the upland property is derived from a pre-statehood patent issued by the United States.*

Under common law, when tidelands are slowly and imperceptibly built up by a deposit of ocean sands, the sovereign is divested of title as fast land is formed and title is acquired by the adjoining riparian owner. As interpreted by the Washington Supreme Court in this case, the Washington Constitution, art. 17 § 1, extinguished the common law right to *future* accretion, just as the constitution was interpreted in the past to have extinguished all other common law riparian rights. See, *e.g.*, *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539 (1891). A fixed instead of a moving boundary results from the state modification of the common law because it has long been the rule in Washington that the state may not acquire title to uplands by erosion. *Washougal Transp. Co. v. Dalles Nav. Co.*, 27 Wash. 490, 68 Pac. 74 (1902).[17]

There is an important exception to the Washington fixed boundary rule. The Washington Su-

[17]The state has never contended and no court below has held, that the state constitution operates to divest an owner of accreted land, title of which vested before statehood under the law applicable at the time the accretion was formed. The state fixed boundary rule merely operates to extinguish the upland owner's common law right to acquire future title to lands not yet formed.

preme Court has acknowledged that the state constitutional change in the common law does not apply to the public domain of the United States (R. 41), 67 Wn.2d at 815, 410 P.2d at 29. It becomes effective only after the United States parts with title. In such case the seaward boundary of the lands would become fixed as of the date of the government's patent, not as of the date of statehood.

The basis for the distinction between private property and the public domain arises from the property clause of the federal constitution which gives Congress the power to make "all needful Rules and Regulations" respecting property belonging to the United States. U. S. Const. art. 4, § 3, cl. 2. The moving boundary rule of the common law, being applicable law prior to statehood, remains applicable law after statehood because Congress has not acted to change it.

I

It cannot be doubted that the common law moving boundary rule can be modified; " * * * no riparian owner has a vested right in the general law of accretion, except as to alluvion that was added to the shore while the law was in effect," *Humble Oil & Refining Co. v. Sun Oil Co.*, 190 F.2d 191, 194 (5th Cir. 1951).

Despite a general preference throughout the nation for a moving boundary, at least two other states beside Washington have chosen a fixed boundary rule. Louisiana, for example, chose to retain title

to accretions formed on the sea or an arm of the sea, leaving only proprietors on rivers and streams to acquire title by accretion. *Zeller v. Yacht Club*, 34 La. Ann. 837 (1882). The Louisiana statute thus accords with prior Spanish civil law codes. See *Ker v. Couden*, 223 U.S. 268, 279 (1911).

Oregon, which like Washington is a public land state, has modified the common law moving boundary rule by statute. Chapter 278, Oregon Laws of 1917, Ore. Rev. Stat. § 274.420 (1965), reserves to the state all land formed from the bed of navigable lakes by accretion or reliction after the effective date in 1917 of the law.

The best statement in support of a state's right to change the common law moving boundary rule is found in an opinion of the federal court in *Western Pac. Ry. v. Southern Pac. Co.*, 151 Fed. 376 (9th Cir. 1907). The court there said, 151 Fed. at 400:

> [T]he decision in *Shively v. Bowlby*, 152 U.S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, sustains the power of a state to cut off, without compensation, the right of a riparian proprietor to future accretion. We know of no decision in which this doctrine has been questioned. If it is within the power of the state to thus appropriate and improve tide-land or submerged land in front of a riparian proprietor, and thus deprive him of the right of future accretion, what tenable ground is there for saying that the state may not by statute accomplish the same result, and for holding that the state of California by its statute of 1872 could not lawfully make provision, as it did, that the limits of lands owned by riparian proprietors of bays and arms of the

> sea could not be extended over the lands then held in trust for the public by virtue of any accretion that might thereafter be deposited thereon?[18]

We note parenthetically that this Court on one occasion referred to the right of "future alluvion" as "vested," *County of St. Clair v. Lovingston*, 23 Wall. 46, 68 (1874). However, the circuit court did not overlook the case; it concluded that the statement was not to be read literally because, 151 Fed. at 398-99:

> The controversy in that case did not even remotely relate to the right of future alluvion, but related only to alluvion then existing. We cannot think that the court meant to announce the doctrine that the right to alluvion becomes a vested right before such alluvion actually exists.

The circuit court's conclusion seems entirely justified. The remark in *County of St. Clair* was intended to meet the argument that specific federal patents were to be construed as conveying property of fixed limits as under the *agri limitati* of civil law.

II

The fact that a riparian owner can trace his title to a pre-statehood United States patent does not preclude state change of the common law moving boundary rule. State changes in the common law

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[18] In *Strand Improvement Co. v. City of Long Beach*, 173 Cal. 765, 161 Pac. 975 (1916), the California Supreme Court rejected the federal court's reading of the state statute. Nonetheless the decision still stands as an expression of the court's judgment that state substitution of a fixed for a moving boundary is constitutional.

generally are usual despite past federal title to all lands that are affected by the change.

Two illustrations from Washington immediately come to mind to demonstrate general changes in common law. Prior to Initiative Measure 208 in 1961 (now Wash. Rev. Code ch. 64.28), Washington did not recognize joint tenancies in real property. Even now the incidents of joint tenancy are not necessarily the same as the common law incidents. See, Griffith, *Joint Tenancy and Community Property*, 37 Wash. L. Rev. 30 (19[illegible]). Similarly, Washington has never recognized the common law incidents of real property ownership by husband and wife. The state, instead, adopted the community property concept from the Spanish law. Wash. Rev. Code ch. 26.16.

It cannot be seriously argued that these laws, being changes in the common law, are not operative simply because all real estate in Washington was once owned by the federal government. They, like any number of other changes in the common law of real property, are nothing more than an exercise by the state of its inherent power to enact law.

Additional illustrations of Washington changes from the common law (*e.g.*, statutes of limitation, conveyancing and recording laws, laws of succession, etc.) could easily be compiled. However, since we are here concerned with Washington's abolition of the riparian right to future accretion, we turn specifically to Washington law relating to riparian rights generally.

Washington law in this field is probably unique. From the earliest days of statehood, *e.g.*, *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539 (1891), to the present time, *e.g.*, *Grill v. Meydenbauer Bay Yacht Club*, 61 Wn.2d 432, 435 378 P.2d 423, 425 (1963), Washington has expressly denied the existence of *all* riparian rights to the proprietor whose land borders navigable waters.[19]

Thus, under the doctrine of the past Washington cases, the riparian rights of wharfage, ferriage, access, and future accretions (rights ordinarily accorded by the common law to the owner abutting navigable water) do not exist in Washington.

In *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278 (1908), one of the early cases in the development of Washington law on riparian rights, it was held that there is no infirmity in the Washington doctrine as applied to riparian land held under a United States patent. *Id.* at 332, 95 Pac. at 280. Likewise, in *Port of Seattle v. Oregon & Wash. R.R.*, 255 U.S. 56 (1921), when Mr. Justice Brandeis (after an exhaustive summary of the Washington law)[20] concluded, *id.* at 67:

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[19]Cases so holding in the intervening years are numerous. See, *e.g.*, the cases cited in *State v. Sturtevant*, 76 Wash. 158, 163, 135 Pac. 1035, 1037 (1913), and *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 331, 95 Pac. 278, 280 (1908).

[20]A part of that summary reads as follows, 255 U.S. at 64:

> Under the law of Washington (which differs in this respect from the law generally prevailing elsewhere) a conveyance by the State of uplands abutting upon a natural navigable waterway grants no right of any kind either in land below highwater mark, *Eisenbach v. Hatfield*, 2 Washington, 236; or in, to, or over the water, *Van Siclen v. Muir*, 46 Washington, 38, 41; except the

> It appears, therefore, that the law of Washington does not recognize as appurtenant to upland, tide land or shore land in its natural condition, rights of any sort beyond the boundaries of the property.

it must be assumed that this Court, too, approved the denial of riparian rights to patentees of the United States. The opinion cited *Weber v. Board of Harbor Comm'rs*, 18 Wall. 57 (1873); *Shively v. Bowlby*, 152 U.S. 1 (1894); and *St. Anthony Falls Power Co. v. Water Comm'rs*, 168 U.S. 349 (1897). Each case concerned the public policy of the United States to leave to the states (or future states) the right to determine the rights and incidents of riparian ownership. That these rights and incidents are a matter of state law despite the source of riparian title is made clear in *St. Anthony Falls Power Co.* where the Court said, 168 U.S. at 363:

> It does not impair the efficacy of the grant or the use and enjoyment of the property by the grantee to hold that riparian rights are to be

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limited preferential right conferred by statute upon the owner of the upland, to purchase the shoreland, if the State concludes to sell the same. Act of March 26, 1890, §§ 11 and 12, Laws of Washington 1889-1890, p. 505. The grantee of the upland cannot complain of another who erects a structure below highwater mark, *Muir v. Johnson*, 49 Washington, 66. He does not acquire any right of access over the intervening land and water area to the navigable channel, *Lownsdale v. Grays Harbor Boom Co.*, 54 Washington, 542, 550, 551. So complete is the absence of riparian or littoral rights that the State may—subject to the superior rights of the United States—wholly divert a navigable stream, sell the river bed and yet have impaired in so doing no right of the upland owners whose land is thereby separated from all contact with the water. *Newell v. Loeb*, 77 Washington, 182, 193-194; *Hill v. Newell*, 86 Washington, 227, 228.

decided by the state courts, inasmuch as the grant, if by the Federal Government, has been held in the cases already cited, not to include title over navigable waters within or bounded by the States.

III

The case of *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1935), is not authority for federal court nullification of Washington's fixed boundary rule. *Borax* was not an accretion case. It involved no accreted lands. It decided no matter of riparian rights. And in any event, the right to future accretion does not qualify as an "*essential* basis of right" (emphasis ours) upon which the riparian right to future accretions may be distinguished from other riparian rights.

We can emphasize our point by reference to the common law incidents of riparian ownership that are admittedly left to state determination. *First*, a state can deny or permit, or permit on terms of its own choosing, access to navigable water. *Port of Seattle v. Oregon & Wash. R.R.*, 255 U.S. 56, 64 (1921), citing with approval *Lownsdale v. Grays Harbor Boom Co.*, 54 Wash. 542, 103 Pac. 833 (1909). *Second*, a state can determine the use riparians may make of the water that flows by their property. *St. Anthony Falls Power Co. v. Water Comm'rs*, 168 U.S. 349 (1897). *Third*, the state may abolish the riparian right to wharf out. *Shively v. Bowlby*, 152 U.S. 1 (1894). *Fourth*, the state may fill tidelands and thereby forestall future accretion.

United States v. Mission Rock Co., 189 U.S. 391 (1903).

If a state has complete freedom to do as it chooses with regard to the rights that make waterfront ownership valuable—rights of access, use of the water, wharfage, etc.—what reason is there for doubting its power to modify the common law accretion rule? Clearly the important consideration underlying the accretion rule is to protect the basic rights of access and use of navigable waters. See, *e.g.*, *Lamprey v. State*, 52 Minn. 181, 53 N.W. 1139, 1142 (1893). It must follow therefore that the right to future accretion hardly qualifies as an "essential" basis of right under a federal patent.

B.—*Washington may designate the line of vegetation as the boundary of its tidelands (even though title to adjoining upland is derived from a pre-statehood United States patent) because such a line is a reasonable interpretation of the common law and one which does not impair the efficacy of the federal grant or the use and enjoyment of the upland property.*

The second question before the Court concerns title to the 386 feet of beach in front of Mrs. Hughes' property, lying between the present "line of mean high tide" and the present "line of vegetation." The state asserts title to this 386-foot strip irrespective of the decision reached on the accretion issue. It does so on the ground that these lands are now tidelands, even under a moving boundary rule.

I

There can be no doubt about the State of Washington's claim of title to lands underlying the navigable waters within the state. Its constitution speaks plainly:

> The state of Washington asserts its ownership to the beds and shore of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: *Provided*, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the the courts of the state. Wash. Const. art. 17 § 1.

By this provision the people of the state claimed rights in *all* navigable waters, whether lakes, rivers, fresh, or salt, to the same extent as the English Crown claimed in the sea. The people thereby rejected any distinction between tidal and non-tidal waters. *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. 735 (1901). The claim, of course, was based upon the inherent sovereignty of the new state, *Robinson v. Silver Lake Ry. & Lum. Co.*, 153 Wash. 261, 274-75, 279 Pac. 1109, 1113 (1929), and in no sense can be deemed ownership by virtue of a grant from the federal government, *cf. Pollard v. Hagan*, 3 How. 212 (1845).

The state was able to make its claim without violating vested rights of others because prior to statehood the United States had held title to the lands underlying navigable waters in trust for the future state. *Shively v. Bowlby*, 152 U.S. 1 (1894).

There likewise has never been any practical question in Washington about the *limits* of the tidelands claimed by the state. State officers exercising jurisdiction over tidelands have always used the line of vegetation to locate the boundary of tidelands (R. 15, Def. Ex. 1, p. 2). The justification for past use of such line is obvious. The statutes governing the platting and disposal of the vast tideland ownership of the state antedate by many years *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1935).[21] No "line of mean high tide" rule had yet been formulated.

For whatever reason the line of vegetation rule was originally adopted, it does have practical advantages. Use of the line of vegetation to determine tideland boundaries gives Washington a uniform rule for determining state interest under all its navigable waters, be they tidelands, as in *Shelton Logging Co. v. Gosser*, 26 Wash. 126, 66 Pac. 151 (1901), and *Harkins v. Del Pozzi*, 50 Wn.2d 237, 310 P.2d 532 (1957), the bed of a navigable lake, as in *Austin v. Bellingham*, 69 Wash. 677, 126 Pac. 59 (1912), or the bed of a navigable stream, as in *Washougal Transp. Co. v. Dalles Nav. Co.*, 27 Wash. 490, 68 Pac. 74 (1902).

Additionally, when adopted, the line of vegeta-

[21]The Washington statutes of general application to platting and sale are presently codified as a part of Wash. Rev. Code ch. 79.01. See, especially, §§ 79.01.008-79.01.032, 79.01.428-79.01.496. The last general revision of these statutes was made by the legislature in 1927, Wash. Laws of 1927, ch. 255, but at the legislative source notes and annotations indicate, the substance of the statutes had its origin in legislation enacted between 1890 and 1897.

tion rule had the merit of coinciding with the definition used by this Court to mark the limits of the tidelands a state might claim by virtue of its sovereignty. In *San Francisco v. LeRoy*, 138 U.S. 656 (1891), decided less than three years after Washington statehood, the Court pointed out, *id.* at 671-72:

> The lands which passed to the State upon her admission to the Union were not those which were affected occasionally by the tides, but only those on which tide-water flowed so continuously as to prevent their use and occupation. To render them tide-lands, which the State by virtue of her sovereignty could claim, there must have been such continuity of the flow of tide-water over them, or such regularity of the flow within every twenty-four hours, as to render them unfit for cultivation, the growth of grasses, or other uses to which up-land is applied.

Interestingly enough, the line of vegetation rule of *San Francisco v. LeRoy*, which the state and its land office follows, is also the rule followed by the federal land office. In the 1947 *Manual of Surveying Instructions* published by the U. S. Dept. of Interior, Bureau of Land Management, the Department of Interior makes no mention whatever of *Borax* and instead quotes the same line of vegetation rule from *San Francisco v. LeRoy* that we have quoted. See *Manual*, at p. 379.

II

The *Borax* line of mean high tide rule as applied to the facts of this case leads to an inappropriate measure of tidelands. Tidelands have their special status as sovereign lands of the state because of their

character, *i.e.*, the uses to which they may be put, their distinctness from adjoining uplands, and their obvious relation or adaptability for use in connection with the water. See, *e.g.*, *Shively v. Bowlby*, 152 U.S. 1, 11, 57 (1894); *Baer v. Moran Bros. Co.*, 153 U. S. 287 (1894). The line of mean high tide, if used to mark the tidelands in front of Mrs. Hughes' property, forces the state to disregard those special characteristics. The reason for this can be readily explained.

The Pacific Ocean tides along Washington's coast rise and fall twice daily. These tides result from the interaction of the gravitational forces of the sun and moon on the rotating earth. U. S. Dep't of Commerce, Coast and Geodetic Survey, *Special Publication No. 135, Tidal Datum Planes* 2 (rev. ed. 1951). The moon, because it is closer, exerts the principal attraction. *Id.* at 2. A complete tidal cycle, *i.e.*, one making allowances for all the considerations that go into a determination of tidal action, extends over a period of 18.6 years. *Id.* at 86.

The tidal datum planes of the U. S. Coast and Geodetic Survey are all based upon the 18.6 tidal cycle. Thus "mean high tide" is defined by it simply "as the average height of the high waters at [any] place over a period of 19 years." *Id.* at 86. Mean high tide is therefore calculated by averaging the heights af daily *higher* high tides and daily *lower* high tides over a period of 19 years. *Ibid.* Mean high tide is therefore the average elevation which is reached by the ocean *twice* daily. It is not the same as the aver-

age daily high tide. Averaging each day's highest tide (over a 19 year period) gives us the tidal datum plane of "mean higher high tide." *Id.* at 124.

In front of Mrs. Hughes' property, the line of mean high tide, determined in accordance with the U. S. Coast and Geodetic Survey's tidal datum plane of mean high tide, fails to include the upper 386 feet of the visible beach as marked by the line of vegetation. Four considerations explain this situation.

First, when the U. S. Coast and Geodetic Survey makes its measurements of the tides, it eliminates irregularities in the sea level caused by larger waves, ocean swells, and seiches. *Id.* at 39. In front of Mrs. Hughes' property, these phenomena add three feet of elevation to the sea level at all times (R. 15, Def. Ex. 5, p. 2, ¶ 5, and Map No. 1). As a result, when the ocean is at the level of mean high water, the waters actually reach land at an elevation three feet higher (R. 15, Def. Ex. 6) and 130 feet further inland than the *line* of mean high tide itself (R. 15, Def. Ex. 5, Map No. 1). The Washington Supreme Court showed this difference on its sketch illustrating the property in dispute (R. 26), 67 Wn.2d at 803, 410 P.2d at 22.

Secondly, the line of vegetation established on the ground is undoubtedly established by the daily *higher* high tides, whereas the line of mean high tide is the averaging of the daily *higher* tides with the daily *lower* high tides. Mean high tide is therefore a calculated elevation which is exceeded, on the aver-

age, once every day even if large waves, ocean swells, and seiches are ignored.

Thirdly, the line of mean high tide being calculated over the 19 year tidal period, by definition ignores those changes in sea level which are of a lesser duration.

Fourthly, where the beach is as flat and open as the area we are here concerned with (R. 15, Def. Ex. 6), it is only reasonable to expect incoming tides to run up the beach beyond the actual level of the ocean itself.

III

We believe the State of Washington, as a matter of federal law, is free to mark the limits of tidelands claimed by sovereign right by either the line of vegetation rule of *San Francisco v. LeRoy*, 138 U.S. 656 (1891), or by the line of mean high tide rule of *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1955). It is free to do so because federal law incorporates[22] state law in the interpretation of a United States patent where no contrary rule is demanded by the patent itself or by federal statute or treaty, *Oklahoma v. Texas*, 258 U.S. 574, 594-95 (1922); *United States v. Oregon*, 295 U.S. 1, 27 (1935); *cf. Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966), "subject to the condition that * * * [state] rules do not impair the efficacy of the grants or the

[22] Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797 (1957).

use and enjoyment of the property by the grantee." *Packer v. Bird*, 137 U.S. 661, 669 (1891). (A Congressional purpose, also, to give a hospitable reception to state law will be found in the Federal Rules of Decision Act, 28 U.S.C. § 1652.)

There is demonstrably no federal interest which demands a uniform tideland boundary throughout the nation. See Corker, *Where Does the Beach Begin, and to What Extent is this a Federal Question*, 42 Wash. L. Rev. 33, 97-98 (1966). Indeed, in the light of the materials Professor Corker collects, it appears that a uniform federal rule can in any event only affect Alaska, Washington, and Oregon. (California is not affected because, despite *Borax*, it adheres to a neap tide rule. *People v. William Kent Estate Co.*, 51 Cal. Rep. 215 (Dist. Ct. App. 1966). Texas and the original thirteen states are not public land states, and in all probability the tidelands of the remaining states are bounded by upland grants of sovereigns other than the United States.) Furthermore, if tideland boundaries call for a uniform rule, there is no principle by which this Court can leave to state courts the problems of inland water boundaries.[23]

In the state courts and now in this Court our contention that federal law incorporates state law has been challenged on the basis of *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1935). *Borax* does indeed

[23]For comment about these problems, see Beck, *The Wandering Missouri River: A Study in Accretion Law*, 43 N. Dak. L. Rev. 429 (1967).

make the issue of an appropriate tideland boundary difficult.

The *Borax* litigation was originally instituted in district court where the district judge held that the government meander line of Morman Island in Los Angeles harbor constituted the boundary between uplands owned by Borax and tidelands held by the city under a legislative grant. *Los Angeles v. Borax, Ltd.*, 5 F. Supp. 281 (S.D. Cal. 1933). However, meander lines are not boundary lines and the judgment was reversed on appeal to the circuit court of appeals. *Los Angeles v. Borax, Ltd.*, 74 F.2d 901 (9th Cir. 1935).

The court of appeals sought to define the boundary in dispute before returning the case to the district court for trial. After reviewing the California and English cases and the California statute under which the city claimed title, the court concluded that the line of mean high tide, as calculated by the U. S. Coast and Geodetic Survey constituted the boundary. The Court adopted this formula because it mistakenly believed, 74 F.2d at 906, "This mean high tide line is the one usually referred to by the United States government in its patents and in the various departments delimiting the boundary between the upland and the tideland." As a matter of fact, even now the Department of Interior ignores the mean high tide line and instructs its employees to use the line of vegetation rule of *San Francisco v. LeRoy*, 138 U.S. 656, 671-72 (1891). U. S. Dep't of Interior,

Bureau of Land Management, *Manual of Instructions for the Survey of Public Lands* 379 (1947).

The court's mistake about the use of the mean high tide line by the federal land office was unfortunate, inasmuch as the court had no evidence before it about the location of such a line. The technical definition of such line was brought to the court's attention for the first time by the briefs on appeal.

Borax, as upland owner, was dissatisfied with the mean high tide rule for it claimed upland ownership extending *below* the line of mean high tide to the line of the neap tides or, alternately, to the vegetation line. 296 U.S. at 15, 22; see, also, Corker, *Where Does the Beach Begin, and to What Extent is this a Federal Question*, 42 Wash. L. Rev. 33, 57-60 (1966). It petitioned this Court for a writ of certiorari and its petition was granted, 295 U.S. 729 (1935).

The City of Los Angeles, of course, sought to uphold the California statute granting it tideland "situated below the line of mean high tide of the Pacific Ocean." This Court disposed of the issues presented by holding:

1. In California, as in other states admitted to an existing Union, the state held full sovereignty and jurisdiction over tidelands to the same extent as that held by the original thirteen states. The Federal government's grant of abutting uplands did not limit the state's rights. 296 U.S. at 15-16.

2. The General Land Office of the United States

had no right to establish the boundary between uplands and tidelands as an incident of its disposal of public lands. *Id.* at 16-21. The district court therefore fell into fundamental error in holding otherwise. *Id.* at 21.

3. The circuit court of appeals properly instructed the district court to ascertain as the disputed boundary the "mean high tide line" rather than the line of the "neap tides." *Id.* at 21-22. The court reasoned that as a matter of federal law (because Borax held title to uplands under a United States patent) the boundary dispute was to be resolved in accordance with the common law and at common law the Crown held title to tidelands lying between the line of mean high tide and the line of the neap tides. *Id.* at 22-26. The court refused to consider those California cases allegedly interpreting the common law so as to restrict the state's rights to tideland lying below the line of the neap tides. *Id.* at 26.

On the facts *Borax* is distinguishable from this case. *Borax* holds that at common law the area *below* the line of mean high tide is most certainly "tideland." There was no issue before the court about the area *above* the line of mean high tide and the only reason the line of vegetation or a line physically marked on the ground was in the case was because it was assumed this line was below that line of mean tide. Necessarily, therefore, the Court was not passing upon the state's rights above the line of mean high tide. Under the facts before the Court, its ruling

conceded the state's right to claim tidelands lying below the line of vegetation.

This Court's refusal to review the California decisions and statutes obviously creates problems of interpretation.[24] Under any view one takes of the case, for or against incorporation of state law, the California decisions and statutes concerning the line of the neap tides is material. We therefore concluded in our brief before the Washington Supreme Court (Brief of App. 70, R. 84) that the Court's refusal to consider California law meant only that the Court was paying deference to the views of the court of appeals which had decided state questions adversely to the upland owner.[25] See 74 F.2d at 905. This is ordinary practice in this Court, *Hillsborough v. Cromwell*, 326 U.S. 620, 630 (1946); rulings of a lower federal court applying local law will not be set aside except on a plain showing of error, *Palmer v. Hoffman*, 318 U.S. 109, 118 (1943).

If we are mistaken about the reasons for the refusal to consider California law, we ask this Court to overrule *Borax* and hold instead that federal law incorporates state law as to the boundary of tidelands adjoining upland patented by the United States whether the state claim be:

1. The line of the neap tides, *e.g.*, *People v. Wil-*

[24] See Corker, *op. cit.*, 42 Wash. L. Rev. 33, 95-96 (1966).

[25] Additionally, *Borax* was decided prior to *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), at a time when the federal courts were still reshaping judge-made law of the states.

liam Kent Estate Co., 51 Cal. Rep. 215 (Dist. Ct. App. 1966);

2. The line of mean high tide, *e.g.*, *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1935);

3. The line of vegetation, *e.g.*, *San Francisco v. LeRoy*, 138 U.S. 656 (1891); or

4. Any other line that is a reasonable development of the common law, subject to the condition that such line does not impair the efficacy of the federal grant or the use and enjoyment of the upland property, *cf. Packer v. Bird*, 137 U.S. 661 (1891).

CONCLUSION

For the reasons stated the judgment of the Supreme Court of the State of Washington should be affirmed.

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General,
HAROLD T. HARTINGER,
J. R. PRITCHARD,
JOHN R. MILLER,
Assistant Attorneys General,
Attorneys for Respondent.

September 6, 1967

APPENDIX A

WASH. LAWS OF 1967, CH. 120

AN ACT Relating to seashore conservation; authorizing the establishment on certain state-owned coastal lands of the Washington State Seashore Conservation Area; providing for the administration thereof; prescribing certain powers and duties with respect thereto; defining the jurisdiction of certain state agencies; redesignating and amending section 46.08.180, chapter 12, Laws of 1961 and RCW 46.08.180; adding new sections to chapter 8, Laws of 1965 and to chapter 43.51 RCW; repealing chapter 78, Laws of 1929 (uncodified); and declaring an emergency.

Be It Enacted by the Legislature of the State of Washington:

Section 1. The beaches bounding the Pacific Ocean from the Straits of Juan de Fuca to Cape Disappointment at the mouth of the Columbia River constitute some of the last unspoiled seashore remaining in the United States. They provide the public with almost unlimited opportunities for recreational activities, like swimming, surfing and hiking; for outdoor sports, like hunting, fishing, clamming, and boating; for the observation of nature as it existed for hundreds of years before the arrival of white men; and for relaxation away from the pressures and tensions of modern life. In past years, these recreational activities have been enjoyed by countless Washington citizens, as well as by tourists from other states and countries. The number of people wishing to participate in such recreational activities grows annually. This increasing public pressure

makes it necessary that the state dedicate the use of the ocean beaches to public recreation and to provide certain recreational and sanitary facilities. Non-recreational use of the beach must be strictly limited. Even recreational uses must be regulated in order that Washington's unrivaled seashore may be saved for our children in much the same form as we know it today.

Sec. 2. There is established for the recreational use and enjoyment of the public the Washington State Seashore Conservation Area. It shall include all lands now or hereafter under state ownership lying between Cape Disappointment and Leadbetter Point; between Toke Point and the South jetty on Point Chehalis; and between Damon Point and the Makah Indian Reservation and occupying the area between the present line of ordinary high tide and the line of extreme low tide, as this line now is or may hereafter be located: *Provided,* That no such Conservation Area shall include any lands within the established boundaries of any Indian Reservation.

Sec. 3. Except as otherwise provided in this 1967 amendatory act, the Washington State Seashore Conservation Area shall be under the jurisdiction of the Washington state parks and recreation commission, which shall administer the act in accordance with the powers granted it herein and under the appropriate provisions of chapter 43.51 RCW.

Sec. 4. The Washington state parks and recreation commission shall administer the Washington

State Seashore Conservation Area in harmony with the broad principle set forth in section 1 of this 1967 amendatory act. Where feasible, the area shall be preserved in its present state; everywhere it shall be maintained in the best possible condition for public use. All forms of public outdoor recreation shall be permitted and encouraged in the area, unless specifically excluded or limited by the commission. While the primary purpose in the establishment of the area is to preserve the coastal beaches for public recreation, other uses shall be allowed as provided in this 1967 amendatory act, or when found not inconsistent with public recreational use by the Washington state parks and recreation commission.

Sec. 5. In administering the Washington State Seashore Conservation Area, the Washington state parks and recreation commission shall seek the cooperation and assistance of federal agencies, other state agencies, and local political subdivisions. All state agencies, and the governing officials of each local subdivision shall cooperate with the commission in carrying out its duties. Except as otherwise provided in this 1967 amendatory act, and notwithstanding any other provision of law, other state agencies and local subdivisions shall perform duties in the Washington State Seashore Conservation Area which are within their normal jurisdiction, except when such performance clearly conflicts with the purposes of this 1967 amendatory act.

Sec. 6. Nothing in this 1967 amendatory act

shall be construed to interfere with the powers, duties and authority of the department of fisheries to regulate the conservation or taking of food fish and shellfish. Nor shall anything in this act be construed to interfere with the powers, duties and authority of the state department of game or the state game commission to regulate, manage, conserve, and provide for the harvest of wildlife within such area, notwithstanding the provisions of RCW 9.61.040: *Provided, however*, That no hunting shall be permitted in any state park.

Sec. 7. Section 46.08.180, chapter 12, Laws of 1961 and RCW 46.08.180 are respectively redesignated as part of chapter 8, Laws of 1965 and of chapter 43.51 RCW and are each amended to read as follows:

For the protection and conservation of natural resources, and for the safety and enjoyment of the public using the beaches, the Washington state parks and recreation commission, after agreement with the Washington state highway commission, shall establish reasonable regulations for the use and control of vehicular traffic on and along the ocean beach highways as designated and established under RCW 79.16.130, 79.16.160, and 70.16.170. The Washington state parks and recreation commission shall cooperate with county sheriffs and the state patrol in inforcing such traffic regulations: *Provided*, That automobile driving shall be permitted on the beaches subject to the authority of the department of fisheries to prohibit driving over clam beds.

Sec. 8. Subject to the qualification contained in section 9 of this 1967 amendatory act, any accreted lands now or hereafter under the jurisdiction of the department of natural resources shall remain under the jurisdiction of that department: *Provided*, That no accreted lands shall be sold, leased, or otherwise disposed of, except as herein provided. The department of natural resources may lease the lands within the Washington State Seashore Conservation Area as well as the accreted lands along the ocean in state ownership for the exploration and production of oil and gas: *Provided*, That oil drilling rigs and equipment will not be placed on the seashore conservation area or state-owned accreted lands. Sale of sand from accretions shall be limited to the needs of cranberry growers in the vicinity and shall not be prohibited if found by the department of natural resources to be reasonable, and not generally harmful or destructive to the character of the land; and such sales may be made by the department of natural resources from sands on the Washington State Seashore Conservation Area if approved by the state parks and recreation commission: *Provided further*, That the department of natural resources may grant mining leases for the removal of "black sands" (minerals) from any state-owned nontrust accreted lands between the north jetty at the mouth of the Columbia River and a line due west from the North Head lighthouse: *Provided further*, That net income from such leases shall be transmitted by the department of natural resources to the state treasurer for deposit in the

state parks and parkways account in the general fund for expenditure by the state parks and recreation commission for the development and protection of the Washington State Seashore Conservation Area and state park developments operated in conjunction therewith: *Provided*, The terms and conditions of such mining leases are agreeable to the state parks and recreation commission.

Sec. 9. The Washington state parks and recreation commission, after consultation with and agreement by the department of natural resources, shall have authority to establish sanitary facilities on, and spur roads through, accreted lands otherwise under the jurisdiction of the department of natural resources. The commission may decide where, when, and how such sanitary facilities and spur roads are to be built.

Sec. 10. Chapter 78, Laws of 1929 (uncodified) is hereby repealed: *Provided*, That the title of anyone who has purchased property under this act shall not be affected.

Sec. 11. Where state-owned lands have been formed by natural or artificial causes between the inner or landside boundary of the Washington State Seashore Conservation Area and adjacent privately owned lands, the department of natural resources:

(1) Shall monument or otherwise visibly mark on the ground, as the boundary between such state-owned lands and adjacent lands, the line of ordinary high tide as it existed on the date of Washington statehood; and

(2) Shall thereafter publish notice once a week for not less than six weeks in a newspaper of general circulation in the county where such lands are situated in order that objections to the location of any monument or visible marker may be filed with the state commission for harbor lines at any time within thirty days after the date of the last publication.

Sec. 12. Proceedings before the state commission for harbor lines as provided for in section 11 of this 1967 amendatory act shall be deemed contested cases and subject to all applicable provisions governing contested cases, including judicial review, as is or may be provided by chapter 34.04 RCW.

Sec. 13. The state, its officers and agencies, persons filing objections with the state commission for harbor lines, and successors in interest to the state or persons filing objections shall be barred from contesting the statehood line of ordinary high tide as monumented or marked in compliance with the order of the state commission for harbor lines, or if no objections are filed, as monumented by the department of natural resources.

Sec. 14. There is added to chapter 8, Laws of 1965 and to chapter 43.51 RCW a new subdivision to read as set forth in sections 1 through 9 and 11 through 13 of this 1967 amendatory act.

Sec. 15. This act is necessary for the immediate preservation of the public peace, health, and safety, and the support of the state government and its ex-

isting public institutions, and shall take effect immediately.

Passed the Senate March 8, 1967.

[s] JOHN A. CHERBERG
President of the Senate.

Passed the House March 7, 1967.

[s] DON ELDRIDGE
Speaker of the House.

Approved March 21, 1967

[s] DANIEL J. EVANS
Governor of the State of Washington.